

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
ATLANTA BRANCH OFFICE
DIVISION OF JUDGES

CAMELOT TERRACE, INC.

and

CASES 13–CA–43936
13–CA–44044

SERVICE EMPLOYEES
INTERNATIONAL UNION, LOCAL 4

Charles Muhl, Esq.

for the General Counsel.

Stephanie Brinson, Esq.

for the Charging Party.

Michael Lerner, President, Pro Se,

for the Respondent.

SUPPLEMENTAL DECISION

Statement of the Case

LAWRENCE W. CULLEN, Administrative Law Judge: On March 4, 2008, I issued my decision in these consolidated cases. The Respondent, Camelot Terrace, Inc., (“Camelot” or “the Respondent”), the General Counsel and the Union filed exceptions and supporting briefs. On September 29, 2008, the National Labor Relations Board, (“the Board”), issued its Decision and Order Remanding to me affirming my rulings, findings and conclusions only to the extent consistent with the Decision and Order Remanding, and to adopt the recommended Order as modified. The Board adopted my finding that the Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act, (“the Act”), by issuing warnings to and discharging employee Cheryl Henson and adopted my entire remedial order, which concerned only those violations.

I recommended the dismissal of the other allegation in the complaint regarding employee Crystal Lopez. However, the Board found that the complaint allegation that the Respondent, violated Section 8(a)(3) and (1) of the Act by discharging employee Crystal Lopez turned on disputed facts and significant credibility issues that were not adequately resolved for their review. The Board further found that I failed to articulate a basis for many of my credibility determinations and did not address evidence that arguably contradicted a number of my factual findings. The Board held that they were accordingly unable to fulfill their review function. Therefore, the Board severed and remanded the complaint allegation regarding the alleged unlawful discharge of Lopez to me for reasoned credibility resolutions and for findings of fact

that detail the evidence supporting my factual findings and either discredit or reconcile the evidence that contradicts those resolutions and factual findings. The Board cited specific examples in its order. I shall address them in this Supplemental Decision. Other than as explained herein, I adopt the detailed factual statement of my previous decision and find it unnecessary to set forth the facts contained in that decision. In the description set forth below, I have to an extent paraphrased the Board's remand directive. I have thoroughly and carefully reviewed all record evidence and am addressing the credibility concerns raised by the Board in the same sequence set out in the Board's Order. All of the witnesses at the hearing gave the appearance of the certainty of their testimony. I find nothing in the demeanor of the witnesses that either enhanced or detracted from their credibility in my prior decision or in this supplemental decision. I am thus unable to make any credibility resolutions based on the demeanor of the witnesses.

This case involves an incident wherein Respondent's employees Certified Nurses Aide (CNA), Crystal Lopez and CNA, Jessica Palko were assisting patients with eating their breakfast in the dining room. They were joined by Housekeeping Aide, Melissa Wilson who came to assist them. At that point Lopez was charting the patients' appetites using a clipboard. They were joined by Housekeeping Aide, Diana Keith and an argument ensued concerning the assignment of housekeeping hours. Lopez became upset and threw down the clipboard and left. According to Keith, Lopez said "Fuck it, I quit" and left. Lopez, Palko and Wilson all testified that Lopez did not use this expletive and did not say she quit. Lopez then went to her van on the parking lot where she was joined by Nurse, May Nelson. Lopez told Nelson she did not know if she could continue to work there. Director of Nursing ("DON"), Julie Huffman then called on Nelson to come inside because of the cold weather as Nelson had recently been in the hospital. Nelson came back into the facility and was followed by Lopez. Huffman testified that Lopez said she thought things would get better, but they had not and that she quit. Lopez testified she said, "Well, I'm going back to work" and did so and did not quit. Lopez went back to work and worked the remainder of her shift. On the next day Lopez did not return to work because of illness and talked to Respondent's Administrator, Marna Anderson on the telephone. Anderson told Lopez that she had quit and that Anderson was taking this as her resignation. Lopez voted at the Board conducted election which was set the next day and her vote was challenged by Respondent's observer who said that she had been terminated. She then went to work and was met by Administrator, Anderson who told her she had been terminated and told her to leave.

The Utterance of an Expletive and a Statement "I Quit"

The Board found that I relied solely on Diana Keith's testimony and failed to discredit or otherwise address the testimony of witnesses Jessica Palko and Melissa Wilson or of Lopez herself, each of whom testified that Lopez neither said she quit nor issued an expletive on February 25, 2007.

Chronology of Key Events Relating to Lopez's Discharge Remains Unclear

I credited the testimony of Nurse, Noreen Hayes that she saw Lopez and Palko leave on break at 9:00 a.m. and return at 9:15 a.m. However, the testimony of Director of Nursing, Julie

Huffman, Lopez, Palko, and Wilson puts Lopez in the dining room assisting residents with breakfast during this same time frame.¹

- 5 Both Lopez and Palko specifically denied they were on break between 9:00 and 9:15 a.m. The Board found that I failed to reconcile this conflicting evidence and to explain why I was crediting one account over the other.

Other Instances Where I Failed to Adequately Address Conflicts in the Evidence

- 10 The Board found, for example, that I found that Lopez left the building after her argument with Keith and upon her return which was at approximately 9:30 a.m. or 9:35 a.m. wrote “9:18 a.m.” over her sign out time of 9:00 a.m. in the break log and “9:30a.m.” over her sign-in time of 9:15 a.m. In so finding, I credited Hayes’ testimony. The Board found that my account of Hayes’ testimony is inaccurate in a potentially significant respect. Hayes testified
15 that it was at 9:18 a.m. that Lopez wrote 9:18 a.m. over her sign-out time of 9:00 a.m. in the break log. If this is so, it significantly conflicts with the Respondent’s version of the events, that Lopez had quit, left the building, then changed her mind and, upon returning to the building around 9:30-9:35 a.m., made entries in the break log to make it appear that she had been on break.

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Failed to Address Certain Discordant Findings and Evidence Pertinent to His Conclusion that Lopez Voluntarily Quit

- 25 The Board found that on February 26th, Administrator, Marna Anderson told Director of Nursing, Huffman that Lopez had been discharged, but that I did not reconcile this finding with my ultimate conclusion. Nor did I address Lopez’ testimony that she was told by Respondent’s observer at the February 28th election that she had been terminated or her testimony that when she tried to report for work on that day, Anderson told her that she had been terminated. The Board found that I apparently credited Huffman’s testimony that Lopez told Huffman that she
30 quit upon her return to the building on February 25th.² The Board further found that it is undisputed however, that immediately thereafter, Lopez completed her work shift and that I did not explain why Lopez would have told Huffman that she quit and then immediately resume working.

- 35 On review of the record in this case and the chronology of events, I find that the testimony of Charge Nurse, Noreen Hayes is implausible. It is clear that Lopez and Palko were not on break during the 9:00 a.m. to 9:15 a.m. time period. I find it significant that Respondent’s Director of Nursing, Huffman testified that after going to the dining room she observed Palko feeding patients and Wilson standing there but did not see Lopez. Huffman testified she then

¹ Huffman was summoned to the dining room due to the altercation there, but Lopez was no longer present. Huffman then went to the time clock and found Lopez had clocked out. At this point she testified, “it was about 9:15a.m.. She (Lopez) clocked out at 9:18a.m..”

² Huffman testified that Lopez, on her way into the building, told Huffman that she quit because “she thought it was going to get better but it had gotten worse.” The Board found that although not expressly finding that Lopez told Huffman she had quit, I found that Lopez told Huffman that she thought things would get better but they had not and Huffman accepted Lopez’ resignation at that point.

went to the time clock about 9:15 a.m. and specifically observed that Lopez had clocked out at 9:18 a.m. This puts Lopez and Palko in the dining room in the 9:00 a.m. to 9:15 a.m. time frame. Implicit in this testimony of Huffman is that Lopez was in the dining room until about 9:15 a.m. This testimony of Huffman is supported by the testimony of Wilson that Lopez took her break about 9:15 or 9:20 a.m. The foregoing testimony of Huffman clearly refutes the testimony of Charge Nurse, Hayes that Lopez and Palko went on a break at 9:00 a.m. and returned at 9:15 a.m. and that Lopez signed out for an additional break. In light of the foregoing, I do not find credible the testimony of Charge Nurse, Hayes that Lopez and Palko went on break at 9:00 a.m. and returned at 9:15 a.m. I further do not credit Hayes' testimony that Lopez returned at 9:18 a.m. and signed-out for a second break. Although Hayes appeared certain of her testimony, I find it is not plausible given the testimony of Huffman and I do not credit it.

Upon further review, I credit the testimony of Lopez that she had told Huffman that she was going back to work after returning from a break that she had taken in her van wherein, she expressed to Nurse May Nelson that she did not know if she could continue working at Camelot because people were yelling at her. However, Lopez testified that she did not say she was quitting and I credit her testimony. I find, with respect to the testimony of Huffman that Lopez did not say she was quitting but that she was going back to work. It is undisputed that Lopez did return to work and worked the remainder of her shift. I find it is implausible that Lopez would tell Huffman she was quitting and then immediately return to work. Respondent did not call Nurse, May Nelson to testify.

Huffman testified that when she informed Administrator Anderson on the next day, (February 26th), that Lopez had quit, Anderson told her that Lopez was discharged and that Respondent does accept verbal resignations. I find that this testimony of Huffman was un rebutted and I credit it. I further find, that Anderson told Lopez that she had fired her when Lopez went to the facility on Wednesday, February 28th, to return to work and that Anderson also said that she had discharged her. I further credit Lopez' un rebutted testimony that when she went to vote on February 28th, she was challenged by the Employer's observer, Amy Black on the ground that she had been terminated. I find that the use of the terms of discharged, fired, or terminated instead of having "quit" supports the inference that Lopez was discharged and that the testimony of Huffman was not credible in contending that Lopez had "quit". Moreover, the Respondent has asserted multiple reasons for the termination of Lopez by contending variously that Lopez had falsified a break log, abandoned a resident and was a no-call, no-show. I find that none of these reasons were the true reasons for the termination of Lopez. The shifting nature of Respondent's contentions supports a finding of pretext *Seminole Fire Protection*, 306 NLRB 590 (1992).

With respect to these contentions by the Respondent, I find that the record shows that Respondent was grasping at any opportunity to justify its discharge of Lopez. I find on reconsideration of the alleged falsification of the break log that the testimony of Director of Nursing, Huffman and the testimony of Lopez, Palko and Wilson is credible and establishes that the discussion in the dining room took place at some time between 9:00 a.m. and 9:15 a.m. Keith did not testify concerning the timing of the incident. I further find, that the testimony of Charge Nurse, Noreen Hayes that she had signed out Lopez and Palko at 9:00 a.m. for their break and subsequently signed them both back in from their break at 9:15 a.m. is not credible. I specifically find that Hayes' testimony that Lopez signed herself back out for a second break at

9:18 a.m. over her break time of 9:00 a.m. to 9:15 a.m. is also not credible. Lopez' time card shows that she punched out at 9:18 a.m. and punched back in at 9:35 a.m. This was the period when Lopez went out to her van to calm down after the discussion in the dining room. I do not credit Hayes testimony that Lopez and Palko went on break from 9:00 a.m. until 9:15 a.m. at those exact times and that she recorded these exact times based on her observation of a clock. Anderson testified that employees never punch out for breaks on their time cards which are punched out only when employees receive permission to leave the building. However, I do not credit Anderson's testimony as Respondent's records show that Respondent's employees including Lopez, have punched out for breaks of approximately 15 minutes on a number of occasions. At the hearing, Hayes was asked what she was doing during the time she testified that she had observed Palko and Lopez come and go on break. Hayes testified she was charting and had taken a doctor's order on the phone. Both of these activities could have distracted her during this period. She was asked on cross-examination why she had not reported the alleged falsification to her superior on that date and she replied that there were no "higher ups" on duty that day. However, Huffman worked after her shift that day and was on the premises and would have walked by the nurse's station during this period to go outside to retrieve Nelson from the cold and to pick-up a substitute aide. There is no explanation for the testimony of Hayes as set out above other than the conclusion that Hayes testimony was not accurate and was not credible.

Respondent's Administrator, Anderson testified that Lopez was also terminated because she "abandoned her patient when she left because they were in the dining room feeding people." I find this assertion is not credible as it is undisputed that Lopez was not feeding patients but was charting patients' appetites at the time of the incident as testified to by Lopez, Palko, Wilson and Keith. I further find that Respondent's contention that Lopez was a "no-call, no-show" is a pretext that Respondent has asserted to bolster its reasons for its discharge of Lopez. I credit the un rebutted testimony of Lopez that she called off on February 26th, two hours in advance of the start of her shift and informed the midnight nurse that she would be off because she was ill, Respondent did not call the midnight nurse to contradict Lopez' testimony which remains un rebutted. I find that Respondent's various post-hoc explanations were pretextual, *Weldon Williams, & Lick, Inc.*, 348 NLRB No. 45, slip op. at 5-7 (2006).

In my initial decision in this case, I found that Lopez had uttered an expletive and quit her job. In making this determination, I credited the testimony of Director of Nursing, Huffman and Former Housekeeping Unit Aide, Keith and did not otherwise address the testimony of CNA, Palko and Housekeeping Aid, Wilson. In accordance with the direction of the Board, I have again reviewed the evidence and find that the preponderance of the evidence supports the testimony of Lopez, Palko and Wilson over that of Huffman and Keith. I do not find plausible Keith's testimony that Lopez began to yell at her as soon as she came into the dining room area, concerning why a unit aide who was not in the housekeeping department had been assigned hours of work in that department while Wilson who was an aide in the housekeeping department was not assigned the hours. Keith herself was an aide in the housekeeping department and had no authority to assign work to employees. I do not credit Keith's testimony that Lopez said this is a bunch of "B. S.". This comment first appeared in Keith's testimony at the hearing in this case and was not contained in a written statement which Keith had given to Housecleaning Supervisor, Joyce Wahl. I find that it is not plausible that Lopez would have become upset, thrown the clipboard and uttered an expletive on her own without any yelling by Keith. Rather I find, that Lopez became upset because of Keith's turning to Lopez and getting in her face in

response to Lopez’ attempt to serve as a buffer in response to Keith’s initial yelling at Wilson. I credit the testimony of Palko and Wilson, as well as Lopez, that Lopez did not utter an expletive and say that she quit. In this regard, it is noteworthy that both Palko and Wilson are current employees and that their testimony contradicts the position of Respondent, that Lopez uttered an expletive and said she quit. I find their testimony is likely to be reliable and is entitled to considerable weight as they are testifying adversely to their pecuniary interest. *Flexsteel Industries*, 316 NLRB 745 (1995). Although, as I noted in my initial decision in this case, Keith is no longer employed by Respondent and appeared to have no stake in the outcome of this case, it is also noteworthy that Keith was an antagonist in this argument. I find, that the reports of these instances prepared by Huffman and Anderson for the signatures of Wilson and Palko are not entitled to significant weight, and I credit Wilson’s testimony that Lopez said she couldn’t take it anymore and threw down the clipboard and went out and took a break. I credit Palko’s testimony that she told Huffman in response to Huffman’s question that Lopez did not quit but said she had enough and that she was done with this, neither of which statements by Wilson and Palko constitutes a quit or voluntary termination of Lopez’ employment. I credit Palko’s and Wilson’s specific testimony that Lopez did not utter an expletive and did not say that she quit.

The General Counsel and Counsel for Charging Party contend, and I find, that Respondent’s investigation was perfunctory and the reasons for Lopez’ discharge were pretextual. They cite Respondent’s introduction of additional justifications which they contend were pretextual. They also cite the failure to interview Lopez to obtain her side of the story and the different method of interviewing Palko and Wilson who were supportive of Lopez’ position that she did not quit or utter an expletive. Palko and Wilson were not initially afforded the opportunity to review their statements as they were taken by Huffman and Anderson, whereas, Keith, who was supportive of Respondent’s position that Lopez had uttered an expletive and said she quit, was permitted to prepare and sign her statement on her own regarding this incident. It is also contended by the General Counsel and the Charging Party Union and I find that Respondent’s various justifications for discharging Lopez were pretextual and false such as her alleged falsification of a break log, abandonment of a resident and no-call, no-show the day after the 25th incident.

I find that the General Counsel has established a prima facie case of a violation of Section 8(a)(3) and (1) of the Act by its discharge of Crystal Lopez. Initially as set out above, I have found that Lopez did not quit her job but was discharged by the Respondent. I find that Lopez engaged in protected concerted activities as the leading union supporter at Respondent’s facility during the union’s campaign to represent the Respondent’s employees. I find that the Respondent had knowledge of this and had animus against the union and its supporter Lopez. I find that a nexus or link between the protected activities and the adverse action underlying motive has been established. I find that the Respondent has failed to rebut the prima facie case by the preponderance of the evidence. *Wright Line*, 251 NLRB 1083 (1980).

Conclusions of Law

1. Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(3) and (1) of the Act by its discharge of Crystal Lopez.

4. The aforesaid action taken against Lopez, in connection with Respondent's status as an employer, affects commerce within the meaning of Section 2(2), (6) and (7) of the Act.

The Remedy

Having found that the Respondent discharged Lopez in violation of the Act, it shall be recommended that Respondent cease and desist therefrom and take certain affirmative action, designed to effectuate the policies and purposes of the Act and post an appropriate notice. It is recommended Respondent rescind and expunge from its files the discharge issued to Crystal Lopez and immediately offer her reinstatement to her former position or to a substantially equivalent one if her former position no longer exists. Respondent shall make Lopez whole for any loss of backpay and benefits sustained as a result of its unfair labor practices. The backpay amount shall be computed in the manner prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987) at the "short term federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. Section 6621.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended:³

ORDER

The Respondent, Camelot Terrace, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging its employees because of their engagement in protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the National Labor Relations Act.

2. Take the following affirmative actions to effectuate the policies of the Act:

(a) Within 14 days from the date of this Order rescind the discharge of Crystal Lopez and offer her full reinstatement to her former job, or, if that job no longer exists, to

³ If no exceptions are filed as provided by §102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in §102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

a substantially equivalent job without prejudice to her seniority or any other rights or privileges previously enjoyed, and expunge from its files the unlawful discharge.

(b) Make whole Lopez for any loss of earnings and other benefits suffered as a result of the discrimination against her with interest.

(c) Preserve and within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post copies of the attached notice marked "Appendix"⁴ at its facility in Streator, Illinois. Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 2006.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated at Washington, D.C. , December 18, 2008.

Lawrence W. Cullen
Administrative Law Judge

⁴ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

**Posted by the Order of the
National Labor Relations Board
An Agency of the United States Government**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT discharge our employees because of their engagement in union and other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights under Section 7 of the National Labor Relations Act.

WE WILL, within 14 days from the date of the Board's Order, rescind the unlawful discharge of Crystal Lopez and offer her reinstatement to her former job, or, if that job no longer exists, to a substantially equivalent job, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make her whole for any loss of earnings and other benefits as a result of the discrimination against her, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the unlawful actions will not be used against her in any way.

CAMELOT TERRACE, INC.

(Employer)

Dated: _____

By: _____

(Representative)

(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

**The Rookery Building, 209 South LaSalle Street, Suite 900, Chicago, IL 60604-1219
(312) 353-7570, Hours: 8:30 a.m. to 5 p.m.**

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING
AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY
QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE
DIRECTED TO THE ABOVE REGIONAL OFFICE'S
COMPLIANCE OFFICER, (312) 353-7170